No. 90-____

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

PHYLLIS ZAGANO,

Petitioner,

—against—

FORDHAM UNIVERSITY and GEORGE N. GORDON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

1. Whether a federal district court may enjoin prior State proceedings brought pursuant to the State's police power to remedy discriminatory acts, in which the State is the complainant, in which there has been a determination of probable cause and in which the State has substantially completed its case-in-chief, based on the district court's dismissal with prejudice (without a trial or other consideration of the merits) of a separate, private action under Title VII.

2. Whether, in response to a plaintiff's pre-trial request to suspend a federal civil rights action, followed by a pre-trial motion for voluntary dismissal, for the purpose of completing hearings by and before a State agency, the district court should have dismissed the federal action "on the merits" without a trial.

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Opinions Delivered in the Case

The decision of the United States District Court for the Southern District Court, by Judge Richard Owen, made March 15, 1989, denying petitioner's motion for voluntary dismissal, then inviting and summarily granting respondents' motion for involuntary dismissal, was made on the record, which appears at Appendix A, and is not officially or unofficially reported. The slip opinion of the same court, dated July 27, 1989, granting respondents' motion to enjoin the State proceedings, which appears at Appendix B, is not officially or unofficially reported. The opinion of United States Court of Appeals for the Second Circuit (by Judges Richard J. Cardamone, Ralph K. Winter and Frank X. Altimari) dated March 29, 1990, affirming the district court's dismissal and injunction, which appears at Appendix C, is officially reported at 900 F.2d 12 (2d Cir. 1990). The per curiam opinion of the Court of Appeals, dated May 18, 1990, denying petitioner's petition for rehearing, which appears at Appendix D, as of this date, has not been officially reported and is unofficially reported at 1990 U.S. App. LEXIS 8572 (2d Cir. May 18, 1990). The two probable cause determinations of the New York State Division of Human Rights that Fordham University engaged in the discriminatory acts complained of, dated March 4, 1986, which appear at Appendix E, have not been officially or unofficially reported.

Jurisdiction

The date of the entry of the judgment of the court of appeals sought to be reviewed is March 29, 1990. The date of the court of appeals' decision denying rehearing is May 18, 1990. Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Statutes and Rule Involved

United States Code, Title 28 § 2283 (Anti-Injunction Act).

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Fed. R. Civ. P. 41. Dismissal of Actions

> (a) Voluntary Dismissal: Effect Thereof.
>
> . . . .
>
> (2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

N.Y. Exec. Law § 290(2), (3) (New York State Human Rights Law).

> 2. It shall be deemed an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of the state, and in fulfillment of the provisions of the constitution of this state concerning civil rights.
>
> 3. The legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because

of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants. A division in the executive department is hereby created to encourage programs designed to insure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the state; . . . to eliminate and prevent discrimination in employment, . . . in educational institutions, . . . and to take other actions against discrimination as herein provided; and the division established hereunder is hereby given general jurisdiction and power for such purposes.

Statement of the Case

This is a case of Professor Phyllis Zagano,[1] formerly of Fordham University, a Catholic woman who was denied faculty reappointment, and later, tenure, at the hands of respondents Fordham University and its communications department chairman, George N. Gordon, a published pornographer and author of virulently anti-Catholic diatribes in an obscene tabloid that thrives on the degradation of women

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1 Prof. Zagano (currently an associate professor at the Boston University College of Communication) holds five academic degrees including the Ph.D. (from the State University of New York at Stony Brook) and has published two books, a bibliography, thirty-six articles and forty-four review essays in numerous journals, including The Antigonish Review, The American Political Science Review, Book Forum, Journalism Educator, Journalism History, Journalism Quarterly, Journal of Broadcasting, Journal of Family and Culture, Philosophy and Literature, and This World, as well as in the Catholic publications America, Commonweal, Crisis, National Catholic Register and National Catholic Reporter. (Thirty-three of these publications appeared before the reappointment meeting in question, sixteen of which appeared during the time frame under evaluation for reappointment.)

and promotion of lascivious conduct. (No female faculty member in the department had ever been granted tenure.) Prof. Zagano comes to this court seeking to restore her fundamental right to have this dispute heard on the merits, of which she was unfairly deprived by the court below.

This is a meritorious case: The New York State Division of Human Rights ("SDHR"), which investigated and prosecuted Prof. Zagano's case as the deferral agency to the EEOC, found probable cause, after investigation, to conclude that "[Prof. Zagano's] creed and sex were considerations in [Fordham's] decision not to reappoint[ ] her" and that "the subsequent actions [Fordham] took against [Prof. Zagano] after she filed the complaint were retaliatory." Extensive proceedings were conducted by the SDHR, including seven days of hearings, in which the State's case-in-chief was practically completed.

In the meantime, Prof. Zagano, acting individually and pro se, commenced a Title VII action in federal district court. That action, filed after the SDHR commenced its case, proceeded slowly, as the district court and the parties deliberately deferred to the hearings that were ongoing before the SDHR. Then, as the SDHR proceedings approached completion, Fordham and Gordon shifted their strategy and started to push the district court for a trial, hoping to overtake (and thus preempt) the SDHR proceedings. When a tentative trial date was set, Prof. Zagano promptly wrote to the district court, stating: "There is presently underway a New York State Division of Human Rights hearing . . . which hopefully may conclude this year. In this hearing many of the issues in the matter pending before you may very well be resolved. Therefore, I request that this action, which I filed *pro se*, be placed on the suspense calendar, subject to restoration by either side."

Two weeks later, the district court orally denied the request. Within eight business days, Prof. Zagano served and filed a formal motion, with supporting memorandum, for voluntary dismissal, sacrificing her federal action to complete

the SDHR proceedings already in an advanced stage. (Indeed Prof. Zagano's repeated efforts to suspend or dismiss the action came within a month after the very first indication from any party (or the district court) that the case should even be scheduled for trial in the first place.) The district court took up the motion on the date scheduled for trial, summarily denied it, and directed Prof. Zagano's elderly, pro bono counsel to proceed immediately to trial, which he declared he was unable to do. (A4)[2] Counsel had advised Prof. Zagano, who was teaching in Boston, that her presence was not needed in court that day. The court then turned to opposing counsel and invited a motion to dismiss on the merits for failure to prosecute, and summarily granted such motion. (A4) Judgment dismissing the action "on the merits and with prejudice" was entered the next day.

Subsequently, Fordham and Gordon moved the district court for an injunction of the prior pending SDHR proceedings. Over the objection of the SDHR itself, the district court enjoined the State proceedings in their entirety, not only barring Prof. Zagano from her remedies in those proceedings, but precluding the SDHR from carrying out its statutorily-mandated functions with respect to the acts of discrimination that Fordham and Gordon committed. (A8-10) Prof. Zagano submits that the district court was without authority to interfere with the police power of the State and its statutory mandate, and that the district court's refusal to permit voluntary dismissal to complete the State proceedings denied Prof. Zagano due process of law.

Procedural Background

Because this is a case in which the procedural matters ultimately eclipsed the substantive matters, in effect determining the substantive issues, it is necessary to cover the procedural history in some detail.

This case began with acts of discrimination against Prof. Zagano in 1983 and 1984, in denial of her reappointment as

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2 Parenthetical references are to pages in the Appendices hereto.

an assistant professor in Fordham's Communications Department, followed by denial of tenure and other retaliatory actions. The person primarily responsible at Fordham for the advancement of Prof. Zagano was Prof. George N. Gordon, then the chairman of the Communications Department and Prof. Zagano's immediate superior. In discussing the non-reappointment, Gordon admitted to Prof. Zagano, a well-published scholar, that "You are perceived to be very much involved in Catholic matters and affairs" and "some do not like it." Gordon's disdain for "Catholic matters and affairs" is evidenced by his contributions to and support of *Screw* magazine,[3] which villifies Catholicism and unabashedly debases women.[4] (These writings were all during Gordon's tenure as Prof. Zagano's department chairman at Fordham.)

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3 *See* G. Gordon, *Screw You, Mind-Blowing Made Simple*, Screw, Aug. 8, 1983, at 3, col. 1; G. Gordon, *Screw You, They Rob From the Poor and Gag the Rest*, Screw, Oct. 17, 1983, at 3, col. 1; G. Gordon et al., *Screw You, Fifteenth Anniversary Kudos*, Screw, Nov. 14, 1983, at 3, col. 1. (Gordon's Fordham affiliation is prominently stated in those pieces.) Gordon also authored *Erotic Communications* (1980), a book in which he chronicles a college course he taught in which he "require[d] that every student attend one X-rated porno film *in a theatre* either in Nassau or New York County and report in writing the entire experience in detail." *Id.* at 247 (emphasis his).

4 Publication in *Screw* is indefensible under any first amendment analysis or under any concept of "academic freedom" as it is an obscene publication and has been judicially determined as such in the State of New York. *See* State v. Heller, 33 N.Y.2d 314 (1973) (*Screw* held "clearly obscene by any standard" in affirming convictions of its publishers and editors for criminal obscenity), *aff'g*, 72 Misc. 2d 549 (App. Term 1st Dep't 1972) (mem.), *aff'g*, 65 Misc. 2d 549 (Crim. Ct. N.Y. County 1971), *cert. denied sub nom.* Buckley v. New York, 418 U.S. 944 (1974); *see also* United States v. Various Articles of Obscene Merchandise, 411 F. Supp. 1328, 1330 (S.D.N.Y. 1976) ("The fact that [*Screw*] may still be available is thus more indicative of the difficulties of enforcement and the persistence of its publisher than of laxity in community standards."). Being obscene, *Screw* (and publication therein) is entitled to no First Amendment protection. Miller v. California, 413 U.S. 15 (1973).

A year before the federal action, Prof. Zagano sought redress by filing two related complaints before the Equal Employment Opportunity Commission (EEOC), at its New York City office, alleging discrimination on the basis of her sex and religion, and retaliation. The EEOC administratively deferred these matters to the New York State Division of Human Rights (SDHR), which, as the complainant, instituted proceedings. After a lengthy investigation and fact-finding hearings, the State made two findings of probable cause, after investigation (A23-25), concluding (1) that "[Prof. Zagano's] creed and sex were considerations in [Fordham's] decision not to reappoint[ ] her" and (2) that "the subsequent actions [Fordham] took against [Prof. Zagano] after she filed the complaint were retaliatory."

A public hearing before an SDHR Administrative Law Judge was scheduled for May 13, 1987, though it was adjourned twice at Fordham's request to October 26, 1987. The hearing then began, with opening statements and testimony by Prof. Zagano on the State's direct case, which continued on January 7 and March 24, 1988. Fordham began cross-examination on April 6, 1988, which was continued on May 6, 1988. The next several hearing dates were devoted to conciliation, July 22, October 25, November 17 and December 15, 1988, pursuant to § 465.7 of the SDHR Rules of Practice, 9 N.Y.C.R.R. § 465.7. Four additional hearings were scheduled.

But for intervening events in the district court, the remainder of the the State's case was completion of Fordham's cross-examination, and, primarily, Fordham's case-in-chief. The March 9 and 10 hearings were devoted to conciliation procedures. Further hearing dates set by the State for April 6 and 7, 1989 were interrupted by a motion to dismiss by Fordham. The Administrative Law Judge determined that the motion should be decided after completion of hearings, which he scheduled for August 1, 1989, later postponed to October 3, 1989. The October 3 hearing was never held as the district court by then enjoined any further litigation of Prof. Zagano's claims before the SDHR. (A8-10) The State pro-

ceeding has since remained in judicially-imposed suspended animation.

While the SDHR was conducting its proceedings, but before it had issued any process, Prof. Zagano received erroneous information that, in order to continue her claim of employment discrimination, she needed to obtain a "right to sue letter" from the EEOC. She thus wrote the EEOC requesting a "right to sue" letter. In response, despite the fact that State action was already proceeding, the EEOC issued two "notice[s] of right to sue", one for each complaint, which warned: "If you intend to sue the respondent(s) named in your charge, YOU MUST DO SO WITHIN NINETY (90) DAYS OF YOUR RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST" and stated that "With the issuance of this Notice of Right to Sue, the Commission is terminating any further processing of this charge."

After learning that the "notices of right to sue" were unnecessary, Prof. Zagano immediately and repeatedly wrote to the EEOC requesting withdrawal of those notices. The EEOC flatly denied Prof. Zagano's request to withdraw the notices, stating that "Notices of Right to Sue, once issued, may only be withdrawn by the Commission upon a finding that there was agency error involved in the original issuance. There has been no agency error in this instance, thus, your request for withdrawal is not granted." The EEOC cautioned that "the Notices of Right to Sue, already issued, became null and void, (and may not be reissued) if not utilized prior to 90 days following their receipt by you. . . . Thus, if you intend to bring an action in Federal Court, you should commence the same in a timely manner."

Acting accordingly, Prof. Zagano filed (pro se) an action under Title VII in the Southern District of New York. Then, for the next four years, Fordham and Gordon engaged Prof. Zagano in voracious discovery and motion practice, including

fifteen days of depositions of her (never actually concluded) and production of thousands of pages of documents.[5]

Though Fordham and Gordon kept Prof. Zagano occupied in the federal action with motion practice and discovery, judicial involvement was minimal, comprising mainly occasional (once a year) "status" conferences, at which the progress of the SDHR proceedings was reported to the court, which acquiesced in deferring to the SDHR. (There was never even a scheduling order entered pursuant to Fed. R. Civ. P. 16.)[6]

Then, in late December 1988, Fordham and Gordon precipitously changed their litigation strategy and started pressing for a trial of the federal action.[7] (At this point, Fordham's case-in-chief was upcoming before the State, and hearings were scheduled for mid-March.) In response, at a conference on January 13, 1989, the court indicated a tentative March trial date.

After this abrupt change in the coordination of the cases, on February 13, 1989, Prof. Zagano wrote a letter to the district court requesting that the action be placed on the suspense calendar in view of the ongoing SDHR hearing. The letter stated:

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5 Prof. Zagano's mistaken filing of the federal action accorded procedural opportunities to Fordham and Gordon, as there was otherwise no discovery available to them before the SDHR. *See* SDHR Rules of Practice, 9 N.Y.C.R.R. §§ 465.1 *et seq.* (no discovery provisions), and they took full advantage. This was part of their strategy to wear out Prof. Zagano's resolve and to "lawyer her to death."

6 Fordham and Gordon acknowledged to the court that they had "agree[d] to adjourn a number of conferences that had been scheduled in this court because it seemed . . . that it was not appropriate to take up [the court's] time or to waste [counsel's] time with a case we in good faith were trying to settle in another forum."

7 As the supposed reason for this, Fordham and Gordon's counsel claimed that "[w]hen those settlement negotiations faltered [on December 15, 1988], everything changed, in my view." This is contradicted by Fordham's continued engagement in conciliation sessions in March 1989.

> There is presently underway a New York State Division of Human Rights hearing . . . which hopefully may conclude this year. In this hearing many of the issues in the matter pending before you may very well be resolved. Therefore, I request that this action, which I filed *pro se*, be placed on the suspense calendar, subject to restoration by either side.

Prof. Zagano specifically told Fordham and Gordon in advance that if her request was denied, she would then move to dismiss the case without prejudice, for the purpose of continuing the State hearings. At a conference on February 28, 1989, the district court denied Prof. Zagano's request in passing. Then, within eight business days, Prof. Zagano prepared and filed a full motion for voluntary dismissal without prejudice pursuant to Fed. R. Civ. P. 41(a)(2), which the court initially set for hearing on March 31, 1989. (The court actually chose to take up the motion on March 15, 1989.)

In the motion for voluntary dismissal, Prof. Zagano pointed out in detail the status and progress of the ongoing SDHR proceedings with the eighth and ninth hearing sessions approaching in a matter of days and also setting forth and documenting the mistaken circumstances under which the federal action was filed, including Prof. Zagano's three earlier attempts to withdraw the proceedings to no avail. Prof. Zagano's pro bono counsel, who was retired and 77 years of age, also cited his personal inability to try two cases in two different fora in the space of less than a week. He had previously expressed his reservations about his own competence to try a federal case (never having done so before).

On March 15, having seen the motion papers for the first time shortly after 11 a.m., the court heard argument, took a break over the lunch hour, returned at 2 p.m. and summarily denied Prof. Zagano's motion for voluntary dismissal. (A2-6) The court then turned to Prof. Zagano's counsel and said, "I am directing that the case proceed. So, Mr. Poth, call your first witness. I realize you are not going to—[proceed today]" and then immediately turned to Fordham and Gordon's

counsel and invited a motion by them to dismiss with prejudice, and summarily granted such a motion. (A4) The court entered judgment the next day (without the requisite notice under local rules), dismissing the action "on the merits and with prejudice."

A week after judgment was entered, Fordham moved to dismiss before the SDHR, asserting that the State proceeding was now precluded by res judicata, as the district court's judgment stated that it was "on the merits." The State issued a ruling that it would defer the decision on the motion until completion of the hearing, pursuant to the SDHR's Rules of Practice, and scheduled a hearing for August 1, 1989. Fordham and Gordon then moved the district court for a permanent injunction of the State proceedings, rather than allow the State to determine the very issue Fordham and Gordon had submitted to it (res judicata). The district court granted the injunction. (A8-10) Prof. Zagano's appeal to the Second Circuit followed, from the judgment dismissing the action with prejudice and from the injunction order. The Second Circuit affirmed (A11-19) and denied Prof. Zagano's petition for rehearing (A20-22). This petition followed.

Reasons for Granting the Writ

I. INJUNCTION OF STATE PROCEEDINGS WAS AN UNLAWFUL INTERFERENCE WITH STATE POLICE POWER

The State of New York, Executive Department, Division of Human Rights, a non-party, was improperly enjoined from carrying out its statutory mandate. The SDHR is charged, as a matter of public policy, to address discriminatory practices. *See* N.Y. Exec. L. §§ 290-301; *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 464 (1982). To this end, the State made two findings that there is probable cause to believe that Fordham engaged in unlawful discriminatory practices (A23-25), and prosecuted the case pursuant to its statutory mandate.

The mandate of the SDHR extends well beyond providing a forum for private claims of discrimination; it is an exercise of State police power:

> 2. It shall be deemed an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of the state, and in fulfillment of the provisions of the constitution of this state concerning civil rights.
>
> 3. The legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants. A division in the executive department is hereby created to encourage programs designed to insure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the state; . . . to eliminate and prevent discrimination in employment, . . . in educational institutions, . . . and to take other actions against discrimination as herein provided; and the division established hereunder is hereby given general jurisdiction and power for such purposes.

N.Y. Exec. Law § 290(2), (3).

The functions, powers and duties of the SDHR are broad, *see* N.Y. Exec. Law § 295(1)-(16), and it is empowered, among other things, to test, investigate, make, sign and file complaints alleging violations *on its own motion*, *id.* § 295(6)(b) (emphasis added), and to remedy discriminatory practices well beyond what an individual federal or state plaintiff may do. *See id.* § 297(4)(c) (listing remedial mea-

sures the SDHR may implement).[8] In fact, compensation of an aggrieved individual or directing reinstatement are but two of the remedies the SDHR may effectuate. *See id.* § 297(4)(c)(ii) and (iii).[9] Indeed, the State has standing, for example, to require payment to the *State* of profits obtained by a respondent through the commission of unlawful discriminatory acts. In short, the State is concerned with matters well beyond the concerns of a private litigant such as Prof. Zagano. The district court's injunction of the State from acting in those areas was clearly improper, as it was an unlawful federal interference with state police power, reserved to the states.

For this reason, injunction of the State proceedings is indefensible under the doctrine of res judicata, under which "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action," *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Because the scope of the State proceedings and the powers of the SDHR to remedy discrimination are substantially broader than the private remedies available in a Title VII civil action, res judicata cannot bar such remedies. Moreover, res judicata effect cannot be applied to proceedings in which the standard of proof is less. Since the strict rules of evidence prevailing in courts of law or equity are also not binding in State proceedings, N.Y. Exec. Law § 297(b), the State's evidentiary burden is necessarily less. Here, the fact that Prof. Zagano's private civil action under Title VII was dismissed should not preclude the State from prosecuting

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8 The SDHR initiated the proceedings on the complaint of Phyllis Zagano. The SDHR determined in its discretion to investigate and prosecute the case after the EEOC deferred Prof. Zagano's complaint to the SDHR.

9 Moreover, the case in support of a complaint is to be presented by attorneys or agents of the SDHR, as well as by the attorney for the individual complainant, at his or her option. *Id.* § 297(4)(a). The strict rules of evidence prevailing in courts of law or equity are also not binding. *Id.* § 297(b).

Fordham for discriminatory acts. The injunction improperly barred the SDHR from its statutory mandate.

The State itself asserted the impropriety of an injunction of proceedings over which it had concurrent jurisdiction, noting that it is "the New York State agency charged with the enforcement of the Human Rights Law and as the deferral agency under Title VII in New York State, the SDHR is uniquely qualified to decide questions of alleged unlawful discrimination." Further, the State asserted that "[i]nherent in this authority . . . is the authority to make a decision on the issue of whether a complaint is barred by New York State Law on *res judicata* grounds and also to defer this decision until such time as the record at the hearing has been completed." Further, the State noted that "[i]n its history of more than forty years, the SDHR has no record of having been enjoined by a federal court from proceeding on a matter which is already in the process of being heard in an administrative hearing . . . ." Nevertheless, the district court usurped the State's statutory and inherent authority and enjoined it from proceeding in any way whatsoever. This is unprecedented. Nor was the State a party to the federal action, subject to the district court's jurisdiction. Accordingly, the injunction directed at it by the district court was improper and should have been reversed.

II. THE COURT BELOW IMPROPERLY DENIED PETITIONER'S MOTION FOR VOLUNTARY DISMISSAL MADE IN ORDER TO COMPLETE STATE PROCEEDINGS

Certiorari should be granted here because the federal courts' discretionary latitude, based on Fed. R. Civ. P. 41, to deny a litigant substantive rights has reached an impermissible "high water mark" by this case. There has not been a reported decision, until now, that supports summary dismissal with prejudice of a plaintiff's case in response to a motion for voluntary dismissal where the avowed (and undisputed) purpose of the motion was to complete a pending,

active, State case involving the same underlying circumstances. Indeed the sanction of dismissal not only precluded the plaintiff's claims in that case but was also followed by a wholesale injunction of the State prosecuting another case involving the discrimination by Fordham.

Voluntary dismissal under Fed. R. Civ. P. 41 should be encouraged, as it has the salutary benefit of clearing the dockets for other litigants awaiting trial, who must already face a flood tide of backlogs, particularly in civil cases.[10] Federal courts should not chill voluntary dismissal by presenting an untenable dilemma. A plaintiff in good faith seeking voluntarily to end a case should not, in so doing, face possible foreclosure of all substantive rights through involuntary dismissal with prejudice. This especially should not be the case where the avowed purpose of voluntary dismissal is to complete ongoing State proceedings.[11]

In affirming the district court, curiously, the Second Circuit relied on its earlier decision in *Gravatt v. Columbia*

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10 The overall standard applicable to Fed. R. Civ. P. 41(a)(2) has been expressed as follows:

> Usually a court will grant a Rule 41(a)(2) motion providing for a dismissal without prejudice unless the defendant will suffer clear legal prejudice, other than the prospect of a subsequent suit on the same facts.

Phillips v. Illinois Cent. Gulf R.R., 874 F.2d 984 (5th Cir. 1989) (citations omitted). "Moreover, the possibility that the plaintiff will gain a tactical advantage over the defendant in future litigation will not serve to bar a second suit" in a motion under Rule 41(a)(2). Davis v. USX Corp., 819 F.2d 1270, 1275 (4th Cir. 1987). *Accord* 5 J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice* ¶ 41.05[1], at 41-53, 41-62 (2d ed. 1988) ("While the basic purpose of Rule 41(a)(2) is to allow a plaintiff to dismiss an action without prejudice to future litigation, the dismissal must not unfairly jeopardize the defendant's interest. Accordingly, dismissal should in most instances be granted, unless the result would be to legally harm the defendant . . . [S]ubstantial prejudice to the defendant should be the test."); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2364, at 165 (1971 & 1989 Supp.).

11 Here, there was no prospect of recommencement of the federal action, as the petitioner has tendered a covenant not to recommence the case in federal court, leaving only the State proceedings in which to pursue her case.

Univ., 845 F.2d 54 (2d Cir. 1988). (A19) *Gravatt* was superficially similar insofar as it was also a discrimination case against a university. Mr. Gravatt commenced an action in the Southern District of New York. He had commenced a second, similar, suit in the Northern District of Illinois. After difficulties in his Southern District action resulting from his lack of cooperation with the court in discovery, Mr. Gravatt bluntly stated to the Illinois District Court: " 'I am not going back there [New York] again. That case can sit there for ten years for all I care.' " *Id.* at 55. Following an unsuccessful motion to transfer the Southern District case to the Northern District of Illinois, and his failure to comply with the discovery schedule in the Southern District, Gravatt moved in the Southern District for voluntary dismissal, in response to which the court dismissed with prejudice.

Doing the opposite of what it did here, the Second Circuit in *Gravatt* reversed and remanded with instructions to the district court either to deny Gravatt's motion or, if it intended to convert the dismissal to one with prejudice, to afford the plaintiff an opportunity to withdraw the motion. If the motion was denied or withdrawn, the plaintiff was obliged to prepare the case promptly for trial, failing which involuntary dismissal for failure to prosecute would be appropriate. *Id.* at 57. *Gravatt* was a case of an out-and-out refusal to prosecute, following seriously uncooperative and obstreperous conduct. Yet, unlike this case, the plaintiff was nevertheless to "be afforded the opportunity to withdraw his motion [for voluntary dismissal]" and to proceed to trial for the court to consider dismissal with prejudice. In *Gravatt*, the Second Circuit applied restraint that it abandoned in this case:

> We sympathize with the evident exasperation of the District Judge and the Magistrate at Gravatt's conduct in this litigation. There are, however, adequate measures to deal with such conduct where circumstances warrant. *See* 28 U.S.C. § 1927 (1982); Fed.R.Civ.P. 11, 37. Rule 41(a)(2) ought not to become a mechanism to impose upon a plaintiff the extreme sanction of a dismissal with

> prejudice, at least where the plaintiff would rather pursue the litigation than accept that result.

Id. at 57;[12] *see also Andes v. Versant Corp.*, 788 F.2d 1033, 1037 (4th Cir. 1986) ("It upsets notions of fundamental fairness for a court, in response to a party's request for dismissal without prejudice, to grant the request by dismissing *with* prejudice, while failing to give the moving party notice of its inclination to impose this extreme remedy.") (emphasis in text).

Here, while purporting to rely on *Gravatt*, the Second Circuit actually stretched precedent far beyond anything seen before under Fed. R. Civ. P. 41.[13] Indeed, the Second Circuit stretched precedent beyond anything seen before in any Circuit. A review of cases in other circuits amplifies how extreme the Second Circuit's ruling was in this case: *See, e.g., Bush v. United States Postal Serv.*, 496 F.2d 42 (4th Cir. 1974) (reversal of case dismissed with prejudice for failure to prosecute where attorney failed to appear at hearing on dismissal motion; the court noted that "[t]his record does not depict a history of deliberate delay. Nor does it establish that [plaintiff] was responsible for any derelictions of his attorney."); *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241 (5th Cir. 1980) (dismissal for failure to prosecute

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12 *Gravatt* is not distinguishable merely because there may not have been a trial date set at which Gravatt failed to appear. Gravatt unequivocally stated, in open court, his refusal to prosecute in the Southern District. Such a clear repudiation rendered the existence of a formal trial date immaterial.

13 The other principal case relied upon by the Second Circuit below was Bosteve Ltd. v. Marauszwki, 110 F.R.D. 257 (E.D.N.Y. 1986) (Scheindlin, Mag.), a magistrate's memorandum decision in which, among the reasons for denying motion or voluntary dismissal, was that the court "must retain jurisdiction over defendant's compulsory counter-claims, even if plaintiffs' action were dismissed."). Here, by contrast, the effect of voluntary dismissal was the opposite: to reduce, not increase, the number of suits (with the immediate benefit of removing a case involving at least a one-week trial from the federal docket). Bosteve furnished no real authority for the Second Circuit's drastic action here.

reversed; "Dismissal with prejudice, however, is an extreme sanction that deprives a litigant of the opportunity to pursue his claim . . . . warranted only where a 'clear record of delay or contumacious conduct by the plaintiff' exists."); *Peterson v. Term Taxi Inc.*, 429 F.2d 888 (2d Cir. 1970) (dismissal with prejudice after plaintiff failed to appear at the designated time for trial reversed; the court stated: "Whatever the merits of plaintiff's case may be, in our opinion justice requires that he be given a fair hearing on his claim" and that " 'a court must not let its zeal for a tidy calendar overcome its duty to do justice.' "); *McCargo v. Hedrick*, 545 F.2d 393 (4th Cir. 1976) (reversal of sua sponte dismissal for failure to prosecute; "the balance tips in favor of a trial on the merits rather than dismissal for want of prosecution" nor was there any indication that plaintiff was engaging in delay tactics, nor did the record indicate that any less drastic sanctions were first considered); *Davis v. USX Corp.*, 819 F.2d 1270, 1275 (4th Cir. 1987) (in Title VII sex discrimination case, "the mere prospect of the transfer of litigation to State court was an insufficient basis for denying the motion for voluntary dismissal. 'Ordinarily the mere fact that a plaintiff prefers the state courts ought not to prevent his discontinuing his suit; one court is as good as another.' " (citing *Young v. Southern Pac. Co.*, 25 F.2d 630, 632 (2d Cir. 1928) (Learned Hand, J., concurring)); district court's dismissal with prejudice in response to plaintiff's motion pursuant to Fed. R. Civ. P. 41(a)(2) reversed as an abuse of discretion; "in cases involving the scope of state law, courts should readily approve of dismissal when a plaintiff wishes to pursue a claim in state court".);[14] *Durham v. Florida E. Coast Ry.*,

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14 In *Davis*, the Fourth Circuit gives an exhaustive exegesis of the law in this area, drawing authority from the First, Second, Fourth, Fifth, Seventh, Eighth and Eleventh Circuits as well as this Court.

Davis also speaks to respondents' main contention below that they were supposedly prejudiced by dismissal without prejudice in "wasted" discovery and preparation (that they voluntarily undertook):

385 F.2d 366 (5th Cir. 1967) (plaintiff sought voluntary dismissal after three weeks of trial in order to start the litigation anew because plaintiff's motion to amend his complaint to account for newly-discovered evidence had been denied as untimely; the court reversed the order of the district court denying dismissal because the record failed to disclose "any prejudice to the defendant . . . other than the annoyance of a second litigation upon the same subject matter. . . . 'The sanction of dismissal is the most severe sanction that a court may apply, and its use must be tempered by a *careful* exercise of judicial discretion.' ") (emphasis in text); *see also Webber v. Eye Corp.*, 721 F.2d 1067 (7th Cir. 1983) (held that district court improperly dismissed case with prejudice when plaintiff was not present on scheduled trial date, though attorney was); *Holiday Queen Land Corp. v. Baker*, 489 F.2d 1031 (5th Cir. 1974) (district court abused its discretion by refusing to dismiss action without prejudice due to prospect of second suit despite contention by defendant that the subsequent suit would be frivolous); *McCants v. Ford Motor Co.*, 781 F.2d 855 (11th Cir. 1986) (held that it was not an abuse of discretion for the district court to dismiss voluntarily a suit without prejudice even though plaintiff intended to refile his claim in the state courts of another state in order to escape the bar of Alabama's statute of limitations; loss of a valid statute of limitations defense does not constitute a bar to dismissal under Fed. R. Civ. P. 41(a)(2)); *Bolten v. General Motors Corp.*, 180 F.2d 379 (7th Cir.) (reversal of district court order denying dismissal on the ground that any prejudice to defen-

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It is evident from the record that the work and resources expended to date during this litigation will be easily carried over to litigation of the plaintiff's cause of action in state court. There is no basis, therefore, for concluding that the defendant will be prejudiced by a failure to impose this condition [payment of attorneys' fees for "wasted" discovery] on the plaintiff, especially when federal discovery will be useable in the state forum. *See* Tyco Laboratories Inc. v. Koppers Co., 627 F.2d 54, 56 (7 Cir. 1980) (extensive discovery is not prejudicial where evidence discovered may be used in subsequent action).

Id. at 1276.

dant could be cured through establishing appropriate terms and conditions for dismissal; held that such prejudice did not include the risk that the plaintiff's action would be refiled in a separate jurisdiction in order to escape the bar of the statute of limitations), *cert. denied*, 340 U.S. 813 (1950); *Home Owner's Loan Corp. v. Huffman*, 134 F.2d 314 (8th Cir. 1943) (rejecting defendant's contention that dismissal without prejudice would deprive defendant "of its alleged right to freedom from suit in another court upon the same cause of action"; held that "defendant does not have such an absolute right under" Fed. R. Civ. P. 41(a)(2)); *Clubb v. General Motors Corp.*, 14 Fed. R. Serv. 2d 1434 (4th Cir. 1971) (allegations of forum shopping are insufficient to support denial of motion for voluntary dismissal).

Furthermore, as the Fourth Circuit pointed out in *Davis*, citing this Court, "It must also be remembered that, absent compelling reasons or the consent of the parties, a district court's decision to condition dismissal on plaintiff's agreement not to assert state law claims in state court may unduly burden a plaintiff's right of access to such courts. Imposition of conditions limiting a plaintiff's recourse to the state courts may also be an affront to principles of comity because such conditions may usurp the authority of the state courts to resolve questions of state law. *See Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U.S. 4, 9 (1940) ('obviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case'); *cf. Younger v. Harris*, 401 U.S. 37, 44-45 (1971) (discussing principles of comity)." *Davis*, *supra*, at 1275; *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974) (certification of questions of state law by the federal courts "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism").

The discretion accorded under Fed. R. Civ. P. 41 is not absolute but carefully measured: "[I]n ruling on motions for voluntary dismissals, the district court should impose only those conditions which will alleviate the harm caused to the defendant" *Le Compte v. Mr. Chip, Inc.*, 528 F.2d 601,

604-05 (5th Cir. 1976); *Ali v. A & G Co.*, 542 F.2d 595 (2d Cir. 1976) ("The sound exercise of discretion requires a judge to use lesser sanctions than dismissal in the appropriate case."). Where dismissal with prejudice is involved (as opposed to mere denial of a voluntary dismissal motion) it is "generally permitted . . . only in the face of a clear record of delay or contumacious conduct by the plaintiff." *Durham v. Florida E. Coast Ry.*, 385 F.2d 366, 368 (5th Cir. 1967). There was no such record here, and indeed, Prof. Zagano took affirmative steps to minimize duplicative and unnecessary litigation.

Moreover, as the Seventh Circuit pointed out in *Webber*, *supra*, that "[t]here is a well-established public policy favoring hearing cases on the merits" and that " 'courts have been created for the very purpose of trying cases on their-merits and that dismissals with prejudice and default judgments should not be utilized as a handy instrument for lessening the case load burden.' " *Webber v. Eye Corp.*, *supra*, 721 F.2d at 1071 (quoting *Beshear v. Weinzapfel*, 474 F.2d 127, 132 (7th Cir. 1973)).

This case is the the embodiment of the procedural quicksand that a civil rights plaintiff faces in the multi-fora enforcement scheme, particularly when an institutional adversary with an unlimited defense budget battles on procedural turf to avoid the merits.[15] When Prof. Zagano filed her fed-

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15 It has been observed that "even for the wary, Title VII's procedural steps constitute a series of land mines." Dees v. Orr, 33 Fair Empl. Prac. Cas. (BNA) 964, 966 (E.D. Cal. 1983). *See also* Barbetta v. Chemlawn Servs. Corp., 669 F. Supp. 569 (W.D.N.Y. 1987) (noting "treacherous filing requirements of Title VII"). *See generally* B. Goldstein, *Representing a Victim of Employment Discrimination*, Litigation (Section of Litigation, American Bar Ass'n Spring 1987) (describing the "intricate and subtle dance" it takes for a practitioner to overcome "procedural hurdles" of an employment discrimination case); Comment, *Equitable Modification of Title VII Time Limitations to Promote the Statute's Remedial Nature: The Case for Maximum Application of the Zipes Rationale*, 18 U. Cal., Davis L. R. 749 (1985), noting that "Under Title VII, a complainant (an aggrieved job applicant or employee) must follow elaborate procedural steps to receive a

eral action, she did so out of mistaken concern that she had to do so to preserve her right to sue, based on the directives of the EEOC. In that action, she availed herself of practically no discovery (a single document request), and her only motion was for voluntary dismissal. While she had a right of full access to the federal court, she imposed on it very little. Indeed, the case was maintained in "suspense" for most of its duration and Prof. Zagano also sought to have the case formally placed on the court's suspense docket as a practical means of avoiding repetitive proceedings. While minimizing the burden on the court, Prof. Zagano was on the receiving end of practically all of the litigation, including five motions, an extraordinary 15 days (over 2,600 pages) of deposition and production of thousands of documents. Before respondents precipitously started to press for a federal trial (for tactical reasons, to preempt the State proceedings), the case had proceeded with full deference to the ongoing State proceedings, with the acquiescence of the parties and the district court.[16] Basically, Prof. Zagano's request to place the federal action on the district court's suspense calendar, followed promptly by her motion for voluntary dismissal, sought only to continue, for a short time, the course the parties and the district

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court hearing on the merits of her employment discrimination claim . . . . Those with little or no legal knowledge cannot decipher the statute's procedural complexities.").

16 *See* Saylor v. Bastedo, 623 F.2d 230, 239 (2d Cir. 1980) (defendants' "acquiescence in the course of the proceedings . . . gives a certain hollowness to their claims of prejudice through loss of oral testimony"; court and defendants shared blame equally with plaintiff for slow progress of case); *see also* Finley v. Parvin/Dohrmann Co., 520 F.2d 386, 392 (2d Cir. 1975) (court should "give such weight as is appropriate to a defendant's having contributed to such 'undue delays.' "; "the failure of a defendant to call the court's attention to a plaintiff's undue delay in bringing a case to trial . . . may be considered as a factor in informing the court's decision."); SEC v. Everest Management Corp., 466 F. Supp. 167, 171 (S.D.N.Y. 1979) (court denied defendant's motion pursuant to Fed. R. Civ. P. 41(b) as defendant said nothing about inactivity for six-year pendency of action; defendant's "silence over that long period of time is not to be ignored.").

court had charted from the beginning. The district court's draconian measures in response—dismissal with prejudice and wholesale injunction of the State proceedings that Prof. Zagano sought to complete—denied Prof. Zagano fundamental fairness in the process by which her claims should be resolved. Prof. Zagano respectfully requests this Court to review this case and to reinstate the State proceedings, so that her claims may be heard and resolved on their merits.

CONCLUSION

Petitioner requests this Court to grant a writ of certiorari to review the drastic action taken by the court below which denied petitioner any forum to resolve meritorious claims and improperly enjoined State proceedings in an unlawful interference with State police power.

Dated: New York, New York
August 16, 1990

/s/ J. ROBERT LUNNEY
J. ROBERT LUNNEY
Counsel of Record for Petitioner Phyllis Zagano
LUNNEY & CROCCO
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APPENDICES

Appendix A

Decision of the United States District Court for the Southern District of New York Dismissing Action

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 CIV 8706 (RO)

PHYLLIS ZAGANO,

Plaintiff,

v.

FORDHAM UNIVERSITY, GEORGE N. GORDON,

Defendants.

March 15, 1989
11:00 a.m.

Before:

HON. RICHARD OWEN,

District Judge

APPEARANCES

HARRY A. POTH,
CHRISTOPHER CONNELLY,
Attorneys for plaintiff

MARGARET BLAIR SOYSTER,
HOLLY CARTNER,
Attorneys for defendant

[52] AFTERNOON SESSION
2:00 p.m.

THE COURT: I have given quite some thought to this problem, both in anticipation of that motion and during the course of your argument, and I have reread a lot of these materials over the last half hour, and I feel obliged to deny this motion for a voluntary dismissal without prejudice. There are a number of, in my opinion, good reasons to deny it, and I cannot really think of any reasons to grant it.

If you take the various categories that are listed in such cases as Harvey Aluminum and Bosteve, this case is, indeed, on the day of trial, and Fordham has put in an enormous amount of expense to prepare for it.

I do not speak of duplicative expenses of second litigation, but I know personally from my own experience as a trial lawyer if you had a case that was ready to go and it was put off for four months, you had to do much of it again because you didn't keep it at your fingertips and it was all wasted. The motion was not diligently made, at no fault of the lawyer, but it was made on the eve of trial rather than being made a year ago or more.

Without passing on whether it was intended to be vexatious or not, the lawsuit has certainly turned into an instrument of vexation in the hands of the plaintiff with [53] these letters that are being written to alumni, to the trustees, to the president, all of it harassing and indeed almost an extortive kind of measure from their face, and, of course, the letter that I was shown this morning, marked Court's Exhibit 1, is really way beyond the pale and had to be done at the instigation of the plaintiff. I do not see why Mr. Heelan would have written this on his own.

Were there to be a further delay with witnesses here, even assuming that the state agency got down to work rather than just sitting around trying to see if the case couldn't be settled, the witnesses have died, others are retiring, others may die.

This case was set for trial on January 13 of 1989 and it wasn't until mid February that I got a letter from the plaintiff saying she wanted to put it on suspense, which would indicate to, it seems to me, a reasonable person that she was perfectly happy to have the lawsuit out there until all of a sudden she had to do something with it, and of course that's supported by this Heelan letter in January in which the statement is made that Phyllis Zagano's lawyers are ready to go to court and try this case. She said that to him. Presumably whether the lawyers were or were not is another matter, and we have some question about that. She said that to him, and I do take some umbrage at the fact that on this day with all of these problems and all of these **[54]** questions open that are left here for Mr. Poth to be dealing with, she is in Boston having absented herself and left him to deal with the court—

MR. POTH: Your Honor, no, I told her it was all right for her to go.

THE COURT: I know, but it seems to me there was some duty on her part to say, "Judge, I don't want to go forward with this case because," and I am given no "because" on her part, just that she would prefer to go forward with the action in the state, which, although there was a representation that it was going to go forward last week, apparently we had a lot of alleged settlement thumb twiddling, and I read these letters to the University about how "I am going to give money to her defense fund and therefore cut it back from my usual gift to the University", based upon her very provocative mailings, even if justified, to alumni and trustees.

To use an old legal expression, I have a feeling that the University is being horsed around by the plaintiff, and today was the day for her to have her day in court, or to commence her day in court, should this case take several days.

I do not deem it appropriate to permit her to voluntarily dismiss without prejudice, which would mean she could start it all over again in the future if she wanted to **[55]** do it, assuming the statute hasn't run, and this motion comes much too late.

It reasonably appears, as far as this case is concerned, she has really abandoned it, and I have really no ability to ask her, and I, therefore, do not have before me any adequate explanation of why she has taken the position that she has taken.

So the motion is denied. We, therefore, are to proceed to trial, which is what we were to do today, and I, therefore, direct that the case commence.

I gather, given what I have been told, that having directed the case to go forward the plaintiff, through counsel, probably is going to make some statement to me, given the court's direction that the case proceed.

I am directing that the case proceed. So, Mr. Poth, call your first witness.

I realize you told me that you are not going to—

MR. POTH: As you see, your Honor, I don't have any witnesses here. I advised Mr. Dorsa on two occasions within the last week or 10 days, as well as advising Ms. Soyster, that we were not going to proceed to trial today.

THE COURT: Or, I gather—

MR. SOYSTER: Or at any time in this action, that's correct.

[56] THE COURT: I take it there is a motion from the defendant?

MR. SOYSTER: Yes, your Honor. In light of that statement from Mr. Poth I would request that the case be dismissed under 41 (b) now due to plaintiff's failure to show any right to relief, which would be the same as a dismissal at the close of the plaintiff's case.

THE COURT: Based on everything that I have said earlier and we have said this morning, I am going to grant that motion, and the action is dismissed with prejudice.

I take it one or another party here will submit a judgment accordingly?

MR. SOYSTER: Yes, your Honor, I will.

THE COURT: Certainly at a minimum with costs and disbursements to the defendant.

MR. SOYSTER: Thank you, your Honor. We had requested attorney's fees in connection with the motion as well.

THE COURT: The thing that I am putting together in terms of phraseology is do you want any further briefing, anybody, on the issue of attorney's fees or are you prepared to go forward on the court's assessment of the applicability of Colombrito to this situation?

MR. SOYSTER: Your Honor—

THE COURT: Or do you want to argue further this [57] point and that's it? I will accept whatever you want to do.

MR. SOYSTER: I would like to reserve the right to consider and discuss with my client the possibility of making a motion as a prevailing defendant for attorney's fees. That's not covered by the papers that we have submitted.

I would like to pursue the request for attorney's fees in connection with the motion to dismiss which you have just denied. It would seem to me that it might be appropriate to supplement the record with more specific information as to the amounts and that sort of thing, which we did not do for reasons partly of time and partly of privilege, but those concerns are no longer pressing.

THE COURT: Is that agreeable to plaintiff? We will have further briefing on this issue of fees?

MR. POTH: Yes, your Honor. Obviously, I can't respond until I know what Ms. Soyster has in her mind, but one thing I gather from reading the practice books that I should make it clear that I'm not acquiescing or agreeing to—

THE COURT: Of course.

MR. POTH: It's just for proper lawyering, that's all.

(Discussion held off the record)

THE COURT: When will I receive briefing from you [58] all? What do you want? A couple of weeks? Two, three, four weeks?

MR. SOYSTER: That would be good.

THE COURT: Is that agreeable?

MR. POTH: I assume the defendant will go forward first.

THE COURT: Give me a brief. He can respond and you can respond to him. Otherwise, I will receive a dismissal with prejudice, costs and disbursements to the defendant.

MR. SOYSTER: Thank you, your Honor.

MR. POTH: The plaintiff reserving his position, not knowing what to do until we see the further pleadings and briefing.

THE COURT: Okay.

MR. POTH: Thank you, your Honor.

(Record closed)

Appendix B

Decision of the United States District Court for the Southern District of New York Enjoining SDHR

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 Civ. 8706 (RO)

PHYLLIS ZAGANO,

Plaintiff,

—v.—

FORDHAM UNIVERSITY and GEORGE N. GORDON,

Defendants.

OPINION AND ORDER

Appearances

Reid & Priest
Attorneys for Plaintiff
40 West 57th Street
New York, New York
Of Counsel: Harry A. Poth, Jr., Esq.

Rogers & Wells
Attorneys for Defendants
200 Park Avenue
New York, New York
Of Counsel: Margaret Blair Soyster, Esq.

Owen, District Judge:

Dr. Zagano brought this action against Fordham University and others, claiming that Fordham discriminated against her in her academic employment on the basis of her sex and her religion, in violation of 42 U.S.C. § 2000(e). Five years after filing the complaint, on the day set for trial, Dr. Zagano moved for voluntary discontinuance without prejudice, pursuant to Fed. R. Civ. P. 41(a)(2), giving as her reasons the advanced age and inexperience of her counsel, and her preference for informal, plaintiff-oriented state administrative proceedings, where the same claim has been pending for the same protracted period. After a hearing, at which the court noted ample evidence of vexatious, dilatory conduct by the plaintiff and no reasonable excuse for the failure to proceed, plaintiff's motion was denied. Instructed to proceed with the case, plaintiff's counsel informed the Court that he had no witnesses to call, that he could not then and would not ever be prepared to proceed to trial. After this "trial," Fordham moved for dismissal on the merits and with prejudice, pursuant to Fed. R. Civ. P. 41(b). By order dated March 16, 1989, the Court granted Fordham's motion for involuntary dismissal on the merits and with prejudice following the failure to make a case at the trial.

Fordham now seeks to enjoin Dr. Zagano from relitigating her claims before the New York State Division of Human Rights, at a hearing scheduled to take place, despite Fordham's attempt to assert the res judicata effect of this court's dismissal order, on August 1, 1989. In addition, Fordham moves for attorneys fees, under Rule 11, as a sanction for the belated voluntary dismissal motion, and for the overall unreasonable conduct of this case.

Under the circumstances, Fordham is entitled to an injunction against relitigation of these claims. Such an injunction is proper where, as here, it is necessary to protect the court's jurisdiction or to enforce its judgments. 28 U.S.C. § 1651. Where the injunction aims to prevent relitigation of issues barred by the doctrine of res judicata, it does not violate the anti-injunction statute, 28 U.S.C. § 2283. *Browning Deben-*

ture Holders' Committee v. DASA Corp., et al., 454 F.Supp. 88, 101 (S.D.N.Y.), *aff'd*, 605 F.2d 35 (2d Cir. 1978). If "the federal litigation has been unusually burdensome or protracted . . . ," *id.*, further litigation may cause irreparable harm to the prevailing party, already denied long-awaited repose. *Id*; *BGW Associates, Inc. v. Valley Broadcasting Co.*, 532 F.Supp. 1115, 1117 (S.D.N.Y. 1982); *see generally, Amalgamated Sugar Co. v. NL Industries, Inc.*, 825 F.2d 634, 639 (2d Cir. 1987).

An injunction against further litigation of Dr. Zagano's claims is necessary to effectuate this court's March 16, 1989 order of dismissal on the merits and with prejudice. Fordham in the first instance properly addressed its res judicata defense to the State Department of Human Rights ("SDHR"), but, by letter dated June 8, 1989, the SDHR indicated that it would not rule on that defense until it had completed hearings and issued a proposed order. Fordham's experience with SDHR during the course of this litigation creates a reasonable basis for its fear that hearings will not be complete, and the case resolved, for quite some time.

Despite SDHR's apparent reluctance to recognize it, this court's order of dismissal clearly precludes further litigation of Dr. Zagano's claims. As stated at the hearing, the dismissal was "on the merits," based on plaintiff's failure to put on any case at the trial, for which defendants had gone through the trouble of preparing. *See Browning Debenture Holders'*, 454 F.Supp. at 98. The dismissal was a final adjudication, from which plaintiff could have appealed, and the parties and issues involved in the two cases are identical. *See Amalgamated Sugar Co.*, 825 F.2d at 639. Accordingly, there is no doubt that the order stands as a bar to further litigation of these claims in any other forum.

It is also clear that further delay in the resolution of this matter will cause Fordham irreparable harm, justifying an injunction. Dr. Zagano's various highly inflammatory letters to Fordham alumnae and friends demonstrate that the mere existence of any pending lawsuit gives her—as she sees it—the right to continue such communications. Having foregone the opportunity to fully air her grievances and establish her case, Dr. Zagano must realize that her claims are now completely

extinguished. Accordingly, Fordham's motion for an injunction against relitigation of any or all issues involved in this case is granted.

Fordham also has moved for Rule 11 sanctions against both Dr. Zagano and her attorney in connection with the delay in making the voluntary dismissal motion. At status conferences held on January 13, 1989 and February 22, 1989, a March trial date was established, but plaintiff's counsel did not disclose his intention to discontinue the action. Not until March 6, 1989 did plaintiff's counsel state that he would not proceed to trial and move to voluntarily discontinue the action. The reasons given for the failure to proceed to trial—advanced age of counsel and preference for plaintiff-oriented state proceedings—could not have developed during this period prior to trial; since plaintiff's counsel must have known of these impediments from the start, he could have discontinued the suit at an earlier date. By the time plaintiff finally did move to discontinue, defendants' counsel had been forced, needlessly, to prepare for a full trial.

Such costly, burdensome and unnecessary continuations of litigation is sanctionable. *See, e.g., Jackson Marine Corp. v. Harvey Barge Repair, Inc.*, 794 F.2d 989 (5th Cir. 1986); 704 F.2d 652, 656-60 (2d Cir. 1983); *In Re Olympia Brewing Co. Securities Litigation*, 613 F. Supp. 1286, 1305 (N.D.Ill. 1985); *cf. Greenberg v. Hilton*, 870 F.2d 926, 938-39, *reh'g granted*, 875 F.2d 39 (2d Cir. 1989) (sanctions appropriate for making of burdensome discovery request without expectation of further use). However, as unfortunate as I find the untimeliness of plaintiff's voluntary dismissal motion, in the exercise of my discretion I decline to impose sanctions on plaintiff's counsel. As I see it, counsel's conduct did not arise so much out of bad faith on his part as out of the intransigence and irrationality of his client. Accordingly, Fordham's Rule 11 motion is denied.

Submit order on notice.

Dated: July 27, 1989
New York, New York

/s/ RICHARD OWEN
United States District Judge

Appendix C

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 779, 780—August Term, 1989

(Argued: February 14, 1990 Decided: March 29, 1990)

Docket Nos. 89-7757, 89-9007

PHYLLIS ZAGANO,

Plaintiff-Appellant,

—v.—

FORDHAM UNIVERSITY and GEORGE N. GORDON,

Defendants-Appellees.

Before:

CARDAMONE, WINTER and ALTIMARI,
Circuit Judges.

Plaintiff appeals from the decision of the United States District Court for the Southern District of New York (Richard Owen, *Judge*) denying plaintiff's Rule 41(a)(2) motion for dismissal without prejudice and granting defendants' motion to dismiss the action with

prejudice pursuant to Rule 41(b) after plaintiff refused to proceed with the trial of the case.

Affirmed.

ANDREW P. SAULITIS, New York, New York (J. Robert Lunney, Lunney & Crocco, New York, New York, of counsel), *for Plaintiff-Appellant.*

MARGARET B. SOYSTER, New York, New York (Holly A. Cartner, Rogers & Wells, New York, New York, of counsel), *for Defendants-Appellees.*

WINTER, *Circuit Judge*:

Plaintiff-appellant Phyllis Zagano, a former faculty member at defendant-appellee Fordham University, appeals from Judge Owen's dismissal of her complaint with prejudice. The week before the trial was to commence, Zagano moved for voluntary dismissal of her action under Fed. R. Civ. P. 41(a)(2) and then refused to proceed with the trial when that motion was denied. There was no abuse of discretion in the district court's actions, and we therefore affirm.

BACKGROUND

From 1980 to 1984, Zagano was employed by Fordham as an untenured assistant professor in its Department of Communications. George Gordon was

the chair of that department between 1981 and 1984. In July 1983, Zagano was informed that her teaching contract would not be renewed when it expired in August 1984. Thereafter, she pursued various internal and external remedies, including claims with the Equal Employment Opportunity Commission ("EEOC") and the New York State Division of Human Rights ("SDHR"). After seeking and receiving a "right to sue letter" from the EEOC, which terminated the EEOC administrative investigation of her complaint, Zagano filed the present action *pro se* under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 to -18 (1982).

Zagano's amended complaint, filed by counsel, alleged that Fordham's failure to renew her teaching contract was the result of illegal gender and religious discrimination. Zagano alleged that Gordon had published various pieces in the magazine *Screw* that were both pornographic and anti-Catholic. Zagano asserted that Gordon told her that her involvement in "Catholic matters and affairs" was one reason for her nonrenewal and that, in Gordon's view, the denial of reappointment would also avoid a "female tenure suit" in the future.

In the four years after Zagano filed the Title VII action, both parties pursued discovery and appeared for periodic pretrial conferences before Judge Owen. During this period two witnesses who had participated in the denial of Zagano's reappointment died. Two others, including Gordon, encountered poor health. Meanwhile, the SDHR found probable cause that discrimination had occurred, and a hearing on the merits commenced. Between October 26, 1987 and March 10, 1989, eleven

hearing sessions were held by the SDHR without completing the testimony of the first witness, Zagano.

A pretrial conference was held in the Title VII litigation on January 13, 1989. At that conference, defendants' counsel asked whether Zagano intended to pursue the federal action. Her counsel replied that she did. Judge Owen then scheduled the matter for a one-week trial to commence on March 6, 1989. When Zagano's counsel protested that discovery was not yet complete, Judge Owen extended discovery until February 15, 1989. Nevertheless, Zagano made no efforts at further discovery. After the January pretrial conference, defendants proceeded to prepare for trial. On February 13, 1989, however, Zagano, although still represented by counsel, sent a *pro se* letter to Judge Owen requesting that the federal case be "placed on the suspense calendar, subject to restoration by either side" in light of the ongoing hearing before the SDHR. At a status conference in late February, Judge Owen denied the request to place the case on the suspense calendar, but he moved the trial from March 6 to March 15, in part so that Zagano's trial counsel would not have to conduct proceedings before the SDHR and the district court at the same time. On March 6, 1989, appellant moved through counsel for voluntary dismissal of the case pursuant to Fed. R. Civ. P. 41(a)(2), stating as grounds that Zagano had brought the Title VII action "inadvertently" because she had not understood that issuance of a right-to-sue letter would terminate the EEOC's administrative proceedings. The motion also indicated that appellant's counsel preferred the SDHR as a forum because he was "optimistic of reaching a settlement" in the ongoing SDHR proceedings. Finally, Zagano's counsel claimed that he was

ill-equipped to conduct both the SDHR hearings and the federal trial because of advanced age and inexperience.

On March 15, 1989, the day on which the federal trial was to begin, Zagano's counsel appeared and indicated that Zagano did not intend to proceed with the case. After hearing argument on the Rule 41(a)(2) motion, Judge Owen denied it on the grounds that it had been made too late, that Zagano had used the federal action as an "instrument of vexation," and that defendants would be prejudiced because of the time spent preparing the case for the scheduled trial and the diminishing availability and recollection of witnesses. Judge Owen then directed Zagano's counsel to proceed with the trial, but he declined. Defendants moved for dismissal with prejudice pursuant to Fed. R. Civ. P. 41(b), and Judge Owen granted the motion. Plaintiff appeals.[1]

DISCUSSION

It is beyond dispute that a district court may dismiss a case under Rule 41(b) when the plaintiff refuses to go forward with a properly scheduled trial.[2] The only issue,

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1 After judgment was entered in this action, defendants sought and received an order from the district court pursuant to the All Writs Act, 28 U.S.C. § 1651(a) (1982), enjoining the plaintiff and the SDHR from relitigating her claims in frustration of the court's judgment dismissing the case "on the merits." Zagano appeals from that injunction but states that the propriety of the injunction turns as a practical matter upon the propriety of the dismissal of the action with prejudice. In view of our disposition of this matter, therefore, we need not address the merits of the injunction.

2 Fed. R. Civ. P. 41(b) provides in pertinent part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

therefore, is whether Judge Owen abused his discretion in denying plaintiff's Rule 41(a)(2) motion.

Rule 41(a)(2) provides that, except where all parties agree to a stipulation of dismissal, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Voluntary dismissal without prejudice is thus not a matter of right. Factors relevant to the consideration of a motion to dismiss without prejudice include the plaintiff's diligence in bringing the motion; any "undue vexatiousness" on plaintiff's part; the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; the duplicative expense of relitigation; and the adequacy of plaintiff's explanation for the need to dismiss. *See Bosteve Ltd. v. Marauszwki*, 110 F.R.D. 257, 259 (E.D.N.Y. 1986); *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 15 F.R.D. 14, 18 (S.D.N.Y. 1953); *see also Wakefield v. Northern Telecom, Inc.*, 769 F.2d 109, 114 (2d Cir. 1985) (claim withdrawn after trial but before submission to jury dismissed with prejudice for plaintiff's failure to show need for retrial elsewhere); *Pace v. Southern Express Co.*, 409 F.2d 331, 334 (7th Cir. 1969) (dismissal without prejudice properly denied where discovery considerably advanced and defendant's motion for summary judgment pending). Moreover, the denial of a motion to dismiss without prejudice will be reviewed only for abuse of discretion. *See Kern Oil & Refining Co. v. Tenneco Oil Co.*, 792 F.2d 1380, 1389 (9th Cir. 1986), *cert. denied*, 480 U.S. 906 (1987); *see also* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2364, at 161-62 (1971 & Supp. 1990) (stating the standard of review).

The circumstances here amply justified the district judge's denial of the Rule 41(a)(2) motion. Under any test, the motion was made far too late. The action had been pending for over four years, during which it was contested vigorously, if sporadically, and extensive discovery had taken place. Zagano's counsel had affirmatively indicated at the January conference that she intended to pursue the Title VII action, and a firm trial date was set. Only when the trial was less than ten days away did Zagano seek dismissal without prejudice.

Judge Owen was also justified in concluding that granting the Rule 41(a)(2) motion would prejudice the defendants because of the resources they had spent in preparing after a trial date was set at the January conference. We also agree with Judge Owen that the likelihood of additional substantial delays in the SDHR proceedings might result in further loss of pertinent testimony through illness or death.

Appellant argues that she misunderstood her rights when she sought and received the EEOC's "right to sue letter" and that she mistakenly brought the federal action. Even if that is the case, it hardly explains why she made no attempt to correct that mistake until the very eve of trial. She also argues that she believed that defendants were using the federal action only for discovery to be used in the SDHR proceedings and did not intend to push for a trial in the federal case. The record does not support this view of the defendants' conduct but, even if it did, the district judge was well within his authority to insist that this matter go to trial absent a disposition agreeable to all parties.

The district court also properly determined that Zagano's other reasons for requesting dismissal, includ-

ing the ongoing state proceedings and the claimed inexperience of her counsel, were inadequate. The SDHR hearings had begun in October 1987, some fifteen months before she filed her Rule 41(a)(2) motion. In any event, they were proceeding at a pace that would consume months and perhaps even years to conclude.

Moreover, Judge Owen did not err in failing to give priority to the pending state administrative proceeding because the federal case presented no difficult questions of state law best resolved in a state court, *cf. Davis v. USX Corp.*, 819 F.2d 1270, 1275 (4th Cir. 1987) (allowing dismissal to enable South Carolina courts to resolve imputed liability issue), and the prejudice to the defendant was considerably more than the mere "annoyance of a second litigation upon the same subject matter" in the state courts, *Durham v. Florida E. Coast Ry. Co.*, 385 F.2d 366, 369 (5th Cir. 1967); *see also Young v. Southern Pac. Co.*, 25 F.2d 630, 632 (2d Cir. 1928) (L. Hand, J., concurring) ("Ordinarily the mere fact that a plaintiff prefers the state courts ought not to prevent his discontinuing his suit; one court is as good as another." (citation omitted)). We are unimpressed by the claim that her counsel was aged and inexperienced. Notwithstanding the claimed infirmities, the same counsel was going to continue to represent her in the SDHR proceeding if the Rule 41(a)(2) motion were granted. In any event, the claimed limitations of counsel should have become apparent long before the eve of trial.

Finally, we note that Zagano had carried on a campaign seeking public support for her cause, including numerous communications to Fordham alumni and others, many of whom contacted Fordham officials on her behalf. Her communications, inter alia, sought financial

support for the federal litigation, indicating that she intended to pursue the matter. Near the time of the January conference she also led at least one supporter to believe that while she was eager to go to trial in the federal case, defendants' counsel was engaged in delaying tactics to avoid such a trial and to run up exorbitant legal bills. Judge Owen was not in error in concluding that Zagano's desire to abandon the Title VII action after imposing substantial costs on defendants was evidence that "she was perfectly happy to have the lawsuit out there until all of a sudden she had to do something with it" and that the action was an "instrument of vexation" against Fordham.

Zagano mischaracterizes the dismissal of her federal action as a summary and unexpected response to her motion to dismiss without prejudice, implying that she was not provided notice of the court's intention to convert her motion into a dismissal with prejudice. *See Gravatt v. Columbia Univ.*, 845 F.2d 54 (2d Cir. 1988). However, Judge Owen simply denied her motion and ordered her to go to trial. Her motion having been denied, Zagano was obliged to go to trial, "failing which involuntary dismissal for failure to prosecute [was] appropriate," *id.* at 57.

In sum, Zagano's refusal to proceed when the moment of truth arrived fully warranted dismissal of her case with prejudice.

Affirmed.

Appendix D

Opinion of the United States Court of Appeals for the Second Circuit on Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1989

Decided: May 18, 1990

Docket Nos. 89-7757, 89-9007

PHYLLIS ZAGANO,

Plaintiff-Appellant,

—v.—

FORDHAM UNIVERSITY and GEORGE N. GORDON,

Defendants-Appellees.

RULING ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

Before:

CARDAMONE, WINTER, and ALTIMARI,
Circuit Judges.

PER CURIAM:

Plaintiff-appellant seeks rehearing of the March 29, 1990 decision of this panel. Because the petition makes a legal argument that was expressly waived and contains unfounded and unfair attacks on appellant's prior counsel, we are compelled to explain our reasons for denying rehearing.

The petition for rehearing states that the panel "overlooked" the district court's allegedly improper action in enjoining the New York State Division of Human Rights ("NYSDHR") from adjudicating Zagano's claim before it. This is a bold misstatement. We declined to consider the propriety of the injunction because the NYSDHR filed no appeal and appellant's main brief stated that so far as her interest in the injunction was concerned, "the propriety *vel non* of the injunction depends on the propriety of the district court's dismissal of the action with prejudice." Brief of Plaintiff-Appellant at 44. Further, at oral argument, we made an express inquiry as to Zagano's position on the injunction, and counsel for Zagano stated, "My point there is that if the dismissal with prejudice is affirmed, then as a practical matter the case dies . . . ." Because we affirmed the dismissal with prejudice, we accepted counsel's invitation to regard the provisions of the injunction as a moot issue. It can hardly be said, therefore, that we "overlooked" the injunction.

Zagano also argues that she was denied the opportunity to proceed to trial after her motion for voluntary dismissal was denied. The motion for voluntary dismissal was argued and denied on the date set for the beginning of the trial. At no time did Zagano's counsel

indicate that she wanted to go to trial in the federal action but needed an adjournment to gather witnesses. Had such a request been made and denied by the district court, our calculus might be different. Instead, however, it was clear to all parties and the district judge that Zagano intended not to proceed to trial in the federal court. Indeed, appellees' counsel stated on the record that she had been informed by Zagano's attorney that Zagano did not intend to go to trial "at any time in this action." Zagano's counsel did not dispute the fact that he had made this statement or that it was true.

Finally, Zagano argues that because her trial counsel was "bewildered" when the motion for involuntary dismissal was denied, he failed to ask for more time. This claim is unfounded and unfair. We have examined the record carefully and the only "bewilderment" exhibited by Zagano's counsel was when he was confronted by evidence that she had very recently told a supporter that she was anxious to go to trial in the federal action but that Fordham was deliberately delaying the trial. Counsel's surprise over that evidence is understandable.

For the foregoing reasons, appellant's petition for rehearing is denied.

Appendix E

SDHR Probable Cause Determinations

NEW YORK STATE: EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS

SDHR CASE NO: IB-E-CS-84-94387E
FEDERAL CHARGE NO: 021-84-0527

(State Division of Human Rights on the Complaint of)

PHYLLIS ZAGANO,

Complainant,

—against—

FORDHAM UNIVERSITY

Respondent.

DETERMINATION AFTER INVESTIGATION

On December 20, 1983, Phyllis Zagano, who is a Catholic female, filed a verified complaint with the State Division of Human Rights charging the above-named respondent(s) with an unlawful discriminatory practice relating to employment, because of her creed and sex, in violation of the Human Rights Law of the State of New York.

After investigation, the Division of Human Rights has determined that it has jurisdiction in this matter and that there is *PROBABLE CAUSE* to believe that the respondent(s) engaged in or is (are) engaging in the unlawful discriminatory practice complained of.

Pursuant to the Human Rights Law, this matter is recommended for public hearing. Parties will be advised of further proceedings.

DATED AND MAILED: March 4, 1986

STATE DIVISION OF HUMAN RIGHTS

By /s/ ARMANDO S. MARTINEZ
REGIONAL DIRECTOR
Armando S. Martinez

NEW YORK STATE: EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS

SDHR CASE NO: IB-E-O-84-94421E
FEDERAL CHARGE NO: 021-84-1303

(State Division of Human Rights on the Complaint of)

PHYLLIS ZAGANO,

Complainant,

—against—

FORDHAM UNIVERSITY

Respondent.

DETERMINATION AFTER INVESTIGATION

On January 31, 1984, Phyllis Zagano, who had filed a previous complaint, filed a verified complaint with the State Division of Human Rights charging the above-named respondent(s) with an unlawful discriminatory practice relating to employment, because of retaliation against her, in violation of the Human Rights Law of the State of New York.

After investigation, the Division of Human Rights has determined that it has jurisdiction in this matter and that there is *PROBABLE CAUSE* to believe that the respondent(s) engaged in or is (are) engaging in the unlawful discriminatory practice complained of.

Pursuant to the Human Rights Law, this matter is recommended for public hearing. Parties will be advised of further proceedings.

DATED AND MAILED: March 4, 1986

STATE DIVISION OF HUMAN RIGHTS

By /s/ ARMANDO S. MARTINEZ
REGIONAL DIRECTOR
Armando S. Martinez